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No.

In The
Supreme Court of the United States
October Term, 1995

YERCO HUERTA ROJAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE COURT SHOULD RESOLVE THE SPLIT IN THE CIRCUITS CREATED BY THE ELEVENTH CIRCUIT'S DECISION HEREIN CONCERNING THE PROPER ROLE OF "EXPERT" GOVERNMENT WITNESSES IN CRIMINAL CASES AND WHETHER THE OPINIONS RENDERED IN THIS CASE VIOLATED THE PETITIONER'S RIGHTS UNDER CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT?

LIST OF PARTIES

The undersigned, counsel for Petitioner Yerco Huerta Rojas, hereby certifies that the following is a complete list of persons who have an interest in the outcome of this case:

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Almon, Thomas F.
Alvarado, Enrique
Aravena, Luis
Arecibia, Hector Hernan
Barria, Fernando
Berrios, Luis Lorenzo
Bonilla, Mauricio Villanueva
Brown, the Honorable Stephen T.
Canate, Carlos H. Campos
Carreno, Carlos Arturo
Casuso, Louis
Coffey, Kendall
Concha, Luis Farias
DeFabio, Joel
Diamond, Nathan
Diaz, Eduardo Marco
Diaz, Reemberto
DiRosa, Phillip
Fenn, Leonard P.
Flores, Manuel Flores
Freedman, Rick
Garber, the Honorable Barry
Goodman, A.J.
Guerra, Luis
Guerrero, Guillermo
Henriquez, Emilio
Hertz, Linda Collins
Highsmith, the Honorable Shelby
Hildebrandt, Mark
Hutchinson, Richard C.
Jimenez, Julio
Kahn, Roy J.
Kaplan, Joel
Kyle, Patricia J.
Lazarus, Paul
Levine, Jay L.
Lopez, Fernando Gonzalez
Maher, Stephen T.
Martinez, Roberto
Mondaca, Leandro
Moore, Richard A.
Moskowitz, Jay R.
Perez, Claudio
Quesada, Domingo
Quesada, Guillermo
Quijada, Osvaldo Sotgui
Quinon, Jose M.
Raben, David
Rabin, Samuel J.
Raticoff, Bruce D.
Rojas, Yerco Huerta

Rosen, Michael J.
Rothman, David
Sanchez, Aloyma M.
Silva, Gabriel Munoz
Solomon, Harry M.
Steiger, Juan A. Orlandi
Strafer, G. Richard
Tramon, John Castillo
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Vera, Manuel Perez
Verdugo, Eduardo
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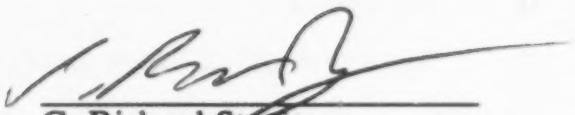
Waxman, Benjamin
White, Jay
Zulaga, Carlos



G. Richard Strafer,
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OPINION BELOW

The June 7, 1995, opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *United States v. Rojas*, 53 F.3d 1212 (11th Cir. 1995). A copy of the decision in *Rojas* is attached hereto as **APPENDIX A.**

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit in *Rojas* was filed on June 7, 1995. The Eleventh Circuit denied rehearing on August 4, 1995. *See* APPENDIX B. This petition for a writ of certiorari followed within 90 days of the latter date. *See* Supreme Court Rule, Rule 13. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Confrontation Clause of the Sixth Amendment provides, in pertinent part: "In all criminal proceedings, the accused shall enjoy the right ... to be confronted with the witnesses against him."

STATEMENT OF THE CASE

A. Procedural History

On January 17, 1992, petitioner YERCO HUERTA ROJAS and 28 co-defendants were charged in a 3 count indictment for attempted importation of cocaine into the United States and possession and conspiracy to possess with intent to distribute cocaine aboard a vessel subject to the jurisdiction of the United States in violation of 21 U.S.C. §§ 952(a), 960 and 963 and 46 U.S.C. §§ 1903(j) and (g). (R1-82.) On July 24, 1992, a jury

convicted Rojas of the charges and, on October 27, 1992, Rojas was sentenced to life imprisonment. (R7-678.)[1]

As noted above, on June 7, 1995, the United States Court of Appeals for the Eleventh Circuit affirmed Rojas' conviction.

B. Statement of the Facts

1. The Non-Expert Testimony

On January 5, 1992, the Coast Guard stopped the *HARBOUR*, a 490 foot cargo vessel, approximately 100 miles South of Guantanamo Bay, Cuba. (R16-9-11, 17.) The ship's captain, Petitioner Rojas, informed the Coast Guard that the vessel had picked up a shipment of zinc in Callao, Peru and initially left there for Baltimore, Maryland on December 17, 1991 but had to return due to mechanical problems. After repairing the vessel, the *HARBOUR* again departed Callao on January 3, 1992. (R17-17-18.) Rojas told the Coast Guard that the vessel had been involved in a highly publicized accident in Chile and that the owners of the vessel, therefore, decided to change its name from the *GOLDEN HILL* to the *HARBOUR* before passing through the Panama Canal from the Pacific Ocean to the Gulf of Mexico. (R16-121.)

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[1] "R" refers to the Record-On-Appeal in the Eleventh Circuit.

Based on an anonymous tip that the vessel contained cocaine, the Coast Guard decided to search it. The search uncovered 187 bails of cocaine in Hold No. 5. According to Officer Floyd Azbell, leader of the search team, the cocaine was concealed under a mound of zinc powder, and he did not see any zinc underneath it. (R18-367.) However, Officer David John Macedo, a member of the search team, claimed that 1-2 feet of zinc was found under the cocaine. (R19-456-57.)

The government produced no eyewitnesses or informants who could testify as to *where* the cocaine was loaded onto the *HARBOUR*. (R19-529.) Two possible theories emerged at trial: (1) Rojas' theory that the cocaine was loaded at the port in Callao, Peru, without his knowledge; and (2) the government's theory that the cocaine was loaded while the ship was at sea. (R19-530, 533.) The *HARBOUR* had cranes or "derricks" on board, but they were never tested by either the Coast Guard or the government to determine whether they were operational. (R19-534.)

2. The Testimony of Brian Williamson

The government presented its theory to the jury through the "expert" testimony of Brian Williamson. Williamson had a degree in maritime studies and held a license as a captain of a merchant ship. (R26-1758.) He spent a total of 13 years at sea. (R26-1759.) However, for the least 16 years, he worked as a solicitor and barrister in London, England, practicing maritime law. (R26-1761, 1763.). One of his clients was Lloyds of

London, which had initially hired him to investigate this particular case, because Lloyds had reinsured the *HARBOUR* for $1.58 million. (R26-1762, 1764, 1923.)[2]

In formulating his opinions about the instant case, 85 percent of the documents he relied upon were supplied to him by the government. The other 15 percent came from "other sources," such as the shippers of the cargo and agents of the Panama Canal. (R26-1765.) Many of the documents were in Spanish, including a log maintained by the chief officer. (R26-1786.) Williamson understood "some" Spanish but conceded he was not fluent in the language. (R26-1767.) Indeed, he did not try to read the entire log, because "[m]y Spanish, quite frankly, is not up to it." (R26-1972.) .

Following this initial testimony, the government tendered Williamson as an expert in the following areas: (1) analysis of "the voyage of the Harbour"; (2) "cargo handling operations and the stability of the Harbour"; (3) the "responsibilities of a merchant crew"; (4) "commercial and port operations," including questions about "the name change of the ship." (R26-1768-69.) Objections to his qualifications and testimony based on Rules 403 and 701-703 of the Federal Rules of Evidence and the Confrontation Clause of the Sixth Amendment were over-

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[2] On cross-examination, Williamson admitted that over 60 percent of his firm's business came from insurance companies, such as Lloyds. (R26-1919.) He also admitted that a determination of no liability would benefit Lloyds. (R26-1927; R27-2141.)

ruled. Thereafter, Williamson testified that certain entries in the ship's log were unreliable and that the ship's true destination was Darrow, Louisiana, not Baltimore, Maryland. (R26-1899, 1901-03.) He also claimed that the official, government-prepared, Spanish-English translation of the ship's log was inaccurate and that the log, correctly translated and interpreted, meant that on December 21, 1991, the derricks around Hold No. 5 were "rigged" or removed from their locked position and raised over the hold. (R26-1870.) Although the log did not use the word "derrick," Williamson claimed that the term could be "assumed." (R26-1877, R27-2111-12.)

Based on his view that the "derricks" had been "rigged," Williamson testified that the only plausible purpose for such a maneuver was to "move cargo." (R26-1875.) He further assumed that such an action would "generally" take place "during the daytime." Locating on a map where the vessel was at mid-day on December 21, 1991, Williamson opined that the derricks were used for "a ship to ship transfer." (R26-1878.) He claimed that his opinion was corroborated by the fact that the ship slowed to about 5 knots earlier that morning, purportedly to accommodate the transfer. At this point, according to Williamson, the weather and sea conditions were "reasonably good." (R26-1878, 1881.) However, he reached the latter conclusion without checking with the National Weather Service or similar sources. (R27-2037, 2039.) Instead, he based this forecast solely on a notation in a log book which indicated that the winds were only blowing at 13.8 to 18.4 miles per hour.

(R26-1972, R27-2018, 2021, 2027.) While Williamson conceded that other log entries indicated "strong winds" and "swells" (R27-2045-47), he chose to discredit these notations. (R27-2049, 2051.) "I think the entry on the right-hand side of the page is wrong." (R27-2051.) In conclusion, Williamson testified unequivocally not only that a "ship to ship transfer" *might* have occurred but that it, in fact, *did* occur on December 21, 1991. (R28-2265-66.)

He further explained that this opinion was based, in part, upon his conclusion that the cocaine could *not* have been loaded at the port of Callao, Peru. (R26-186.) Williamson had not been in Callao, Peru for at least 9 years (R27-2202) and admitted that he had no experience in the transportation of narcotics or smuggling operations. (R26-1933-34; R27-2208.) Nonetheless, he was allowed to render an expert opinion that it was "impossible" to smuggle contraband through the "very tight" security at the port. (R26-1886-87, 1907-08; R27-2202.)

Williamson acknowledged that his opinion about where the loading occurred was based, in part, upon Officer Macedo's testimony that zinc was found underneath the cocaine in Hold No. 5. (R27-2206, 2211.) He acknowledged that in accepting Officer Macedo's testimony, he chose to discredit Officer Azbell's testimony that the cocaine was at the very bottom of the zinc pile. (R27-2207.)

Williamson also conceded that his opinions were based on a number of other assumptions. For example, due to the

danger of ships colliding during a ship-to-ship transfer, he assumed that the "skipper" of the assumed "mother ship" was experienced. (R27-2015-16.) He also assumed that the assumed mother ship was smaller than the *HARBOUR* but of a size 50-75 feet. (R27-2017.) Indeed, he "assumed" it was a "fishing vessel." (R27-2017.) Williamson also had to assume that the derricks on board the *HARBOUR* were operational, since they were never tested (*see* p. 4 *supra*), that the log entry for December 21, 1991 really meant to refer to derricks, although the word was never used and that work on the derricks was performed during the day time.

With respect to the name change of the vessel in Panama, Williamson testified that publicity from the accident in Chile was "not a valid reason for going to the expense of changing the ship's name." (R26-1892.) According to Williamson, "[i]t's just human nature" for people to forgive and forget such an episode. (R26-1892.) On cross-examination, Williamson admitted that he had never had a case involving a name change of a vessel, had never before testified as an expert about name changes and had not seen the publicity concerning the accident in question. (R26-1948; R27-2008, 2246)

Finally, Williamson testified that a single band, high frequency radio found in the Captain's cabin was unusual. Williamson claimed he had never seen such a radio before, suggesting that the only purpose for the radio was to communicate with drug traffickers. (R26-1904.)

Renewed objections to Williamson's qualifications and opinions based on Rules 403 and 701-03 of the Federal Rules of Evidence and the Confrontation Clause of the Sixth Amendment were all overruled. (R26-1775-82, 1788-96, 1799-1801, 1934-35; R27-1992-94.)

Rojas put on his own expert witnesses concerning the weather and sea conditions, as well as testimony from investigators concerning the sloppy security procedures *currently* at the port in Callao Peru. (R32-2998-3003.) In rebuttal, the government again called Williamson to the stand where he reiterated his opinions concerning the ship-to-ship transfer. (R33-3214; *see also* R33-3215.) He also continued to maintain his opinion about the impossibility of the cocaine being loading Callao, Peru: "I believe that Callao was impossible. I don't change that opinion today. And also the cocaine was loaded on top of the zinc.... So the cocaine was loaded after the zinc." (R33-3218.)

C. The Eleventh Circuit's Decision

On appeal, Rojas argued that the district court's rulings concerning the propriety of Brian Williamson's expert testimony violated his Sixth Amendment right of confrontation as well was Rules 403 and 701-703 of the Federal Rules of Evidence. The Eleventh Circuit summarily rejected these arguments in a footnote. *See United States v. Rojas*, 53 F.3d 1212, 1213 n. 1 (11th Cir. 1995).

REASON FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE PETITION TO CLARIFY THE CONFUSION IN THE CIRCUITS CONCERNING THE PROPER USE OF GOVERNMENT EXPERTS IN CRIMINAL CASES AND THE CONSTITUTIONALITY OF CERTAIN CATEGORIES OF EXPERT TESTIMONY UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT.

A. The Eleventh Circuit's Decision Creates a Conflict Within the Circuits Over the Meaning of Daubert

The admissibility of expert testimony is governed primarily by Rule 702 of the Federal Rules of Evidence.[3] In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 113 S.Ct. 2786 (1993), this Court recently underscored the duty of trial courts to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 113 S.Ct. at 2795. *See also id.* at 2800 (Rehnquist, J.) (concurring in part) (Rule 702 entrusts federal judges with a "gatekeeping responsibility"). *See also Wilt v. Buracker*, 443 S.E.2d

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[3] Rule 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

196, 210 (W.Va. 1993) ("[i]n other words, no *Frye* test, but no guys with bones through their noses casting colored stones either") (Neeley, J., concurring, describing the impact of *Daubert*). Courts must closely scrutinize expert testimony, in part, because of its unique status under the Federal Rules of Evidence:

> The expert witness is the only kind of witness who is permitted to reflect, opine, and pontificate, in language as conclusory as he may wish.... Once we recognize the expert witness for what he is, an unusually privileged interloper, it becomes apparent why we must limit just how far the interloping may go. A witness cut loose from time-tested rules of evidence to engage in purely personal, idiosyncratic speculation offends legal tradition quite as much as the tradition of science. Unleashing such an expert in court is not just unfair, it is inimical to the pursuit of truth. The expert whose testimony is not firmly anchored in some broader body of objective learning is just another lawyer, masquerading as a pundit.

Huber, *Galileo's Revenge: Junk Science in the Courtroom* (2d Ed. 1993), at p. 204 (hereinafter "HUBER").

To prevent trials from becoming free-for-alls of "purely personal, idiosyncratic speculation" by "interloping" experts about contested issues, the Court in *Daubert* established the following non-exclusive list of factors to guide lower courts in applying Rule 702:

(1) Whether a scientific theory or technique can be (and has been) tested.

(2) Whether the theory or technique has been subjected to peer review and publication.

(3) The known or potential rate of error and the existence and maintenance of standards controlling the technique's operation.

(4) Whether the technique is generally accepted.

Daubert, 113 S.Ct. at 2796-97.

Williamson was allowed to testify as an expert about the following subjects:

- **Weather and sea conditions**
- **The current use of radios on ships**
- **Ship-to-ship transfers**
- **Truth-telling of trial witnesses**
- **The "reliability" of entries in a ship's log**
- **Name changes by merchant vessels**
- **The effect of bad publicity in Chile**
- **The *HARBOUR*'s true destination**

However, not one of the four standard measures of reliability were satisfied in this case as to any of these subjects.

None of Williamson's myriad opinions could be or were tested and none were arrived at through any objectively verifiable methodology. None were subject to peer review or publication. Although Williamson would not admit to any "potential rate of error," the risk of error was exceedingly high.

Williamson conceded to having only a passing knowledge of Spanish but was allowed to retranslate the government's exhibits in order to create a factual predicate for his subsequent opinions. Similarly, his elimination of Callao, Peru as a possible loading point was based on outdated and unsupported beliefs unconnected to anything in his training, education or experience. The risk of error infecting his conclusions was increased further by the fact that they were also based, in part, upon his acceptance of Officer Macedo's testimony concerning the zinc over the testimony of Officer Azbell. *See infra.* Williamson did not even have the "derricks" tested to see if they were operational, before testifying that they were *in fact* used to accomplish the ship-to-ship transfer. (R19-534.)

Finally, the techniques he used -- for example, in determining the weather and sea conditions at the time of the alleged ship-to-ship transfer -- were not "generally accepted." Williamson's opinions were based solely on those notations in the log books which he deemed "reliable" (after discounting others that contradicted his opinion). Williamson could have, but did not, seek to verify his interpretation of the logs by seeking data from the National Weather Service, the National Climatic Data Center, the Merchants Vessel Reporting System, the Mariners Weather Log or the National Hurricane Center. (R27-2037, 2039; R31-2745-48.)

"Unleashing such an expert in court [was] not just unfair, it [was] inimical to the pursuit of truth," HUBER, at p. 204, -- because without Williamson's opinions, the government had no

evidence that a ship-to-ship transfer occurred, that drug smuggling at the port of Callao, Peru was difficult, much less "impossible" as Williamson contended, that there was anything unusual about the vessel's name change or Rojas' possession of a radio in his quarters or the many other prejudicial statements allowed into evidence through Williamson's testimony.

Unlike the Eleventh Circuit herein, other Circuits have taken their "gatekeeping" responsibilities seriously by excluding unreliable expert testimony. *See, e.g., United States v. Powers*, 59 F.3d 1460 (4th Cir. 1995) (excluding expert testimony concerning "penile plethysmograph" under *Daubert*); *United States v. Dorsey*, 45 F.3d 809 (4th Cir. 1995) (expert testimony failed to meet *Daubert* standards); *Berry v. City of Detroit*, 25 F.3d 1342, 1350-52 (6th Cir. 1994) (holding that trial court erred in its "gatekeeper" responsibility by admitting testimony from a self-styled expert in police training who linked a man's death to the police department's failure to train its officers properly); *United States v. Sepulveda*, 15 F.3d 1161, 1183 (1st Cir. 1993) (approving the district court's decision to strike expert testimony after cross-examination revealed that his opinions were "less the fruit of an expert mind attuned to the testimony in the case than the yield of undifferentiated conversations over the years with unidentified police officers regarding Sepulveda and his associates"); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) (physician's testimony linking cataracts to exposure to radioactive materials held inadmissible because none of the authorities he

cited supported his conclusion); *Marcel v. Placid Oil Co.*, 11 F.3d 563 (5th Cir. 1994) (rejecting economist's testimony regarding life expectancy of oil field workers since study was not tied to life expectancy of plaintiff in this case); *Porter v. Whitehall Laboratories, Inc.*, 9 F.3d 607 (7th Cir. 1993) (upholding trial court's rejection of experts' testimony that ibuprofen caused renal failure); *Wilson v. City of Chicago*, 6 F.3d 1233, 1238 (7th Cir. 1993) (court properly excluded testimony of pathologist who claimed to be an expert "in the physiology of torture," citing *Daubert*). The Court should grant the writ in order to reconcile the Eleventh Circuit's overbroad construction of Rule 702 and *Daubert* with that of every other Circuit.

B. The Government's Use of Williamson Violated the Confrontation Clause

Rule 703 of the Federal Rules of Evidence allows experts to base their opinions on data either perceived or made known to them, *i.e.*, upon hearsay, so long as the data is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."[4] However,

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[4] Rule 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences

(continued...)

the history of Rule 703 suggests -- and the Confrontation Clause of the Sixth Amendment compels -- that a second limitation be imposed upon an expert's use of hearsay. The hearsay must also fall within a recognized exception to the hearsay rule. *See, e.g.*, Fed. R. Evid. 803(4) (statements for purposes of medical diagnosis); Fed. R. Evid. 803(6) (records of regularly conducted activity); Fed. R. Evid. 803(18) (learned treatises).

Under the Sixth Amendment, hearsay may be used as substantive evidence against a criminal defendant without violating his right to confrontation only if the hearsay has indicia of reliability and trustworthiness. *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980). In order for the introduction of hearsay to pass muster under the Confrontation Clause, this Court has ruled that the hearsay must fall within a well-rooted hearsay exception which has such indicia or otherwise have particularized guarantees of trustworthiness. *Roberts*, 448 U.S. at 66.

The rules permitting expert testimony are not among the "well-rooted" hearsay exceptions. Indeed, when the Federal Rules of Evidence were promulgated in 1975 they *eliminated* several common law limitations on the use of expert testimony. For example, at common law, an expert could only base an opinion upon facts within his personal knowledge or facts that were in evidence and made known to him at trial. Jack B.

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[4](...continued)
upon the subject, the facts or data need not be admissible in evidence.

Weinstein & Margaret A. Berger, WEINSTEIN'S EVIDENCE MANUAL, ¶ 13.03[02], at 13-16 to 13-17 (1993) (hereinafter WEINSTEIN); Nossel, *Note: The Admissibility of Ultimate Issue Expert Testimony By Law Enforcement Officers In Criminal Trials*, 93 COLUM. L. REV. 231, 234 (1993) (hereinafter NOSSEL). In this case, Williamson repeatedly relied upon assumptions, unsupported by *any* evidence, as well as hearsay and matters not in evidence to formulate his opinions. Opinions based upon such a speculative basis would never have been admissible under the common law.

Although the Federal Rules have expanded the matrix of information upon which experts can theoretically rely, in order to fulfill their "gatekeeping" function, courts must ensure that *the type* of hearsay, as well as any other information relied upon by the expert, is sufficiently reliable. As the Court emphasized in *Daubert* when construing Rule 702, expert opinions must have "*evidentiary* reliability -- that is, trustworthiness." *Daubert*, 113 S.Ct. at 2795 & n. 9. Other courts have reached similar conclusions under Rule 703. *See, e.g., Cella v. United States*, 998 F.2d 418, 423 (7th Cir. 1993) (holding that "expert testimony must be rejected if it lacks an adequate basis in fact" and recognizing that "[a]n expert witness cannot simply guess or base an opinion on surmise or conjecture") (citing *Agent Orange*); *United States v. Gaskell*, 985 F.2d 1056, 1061 (11th Cir. 1993) (government's expert on shaken baby syndrome was inadmissible and reversible error under Rule 703, because it was based, in part, upon hearsay from an unrelated case and

the government failed to establish that "this unrelated case provided any reliable or accurate basis upon which to draw conclusions regarding [the victim's] death"); *United States v. De Soto*, 885 F.2d 354, 361 (7th Cir. 1989) (noting that "the expert must not base his opinion on mere speculation"); *Ricciardi v. Children's Hospital Medical Center*, 811 F.2d 18 (1st Cir. 1987) (construing Rule 703 to prevent an expert from relying on an unauthenticated slip of paper in a medical record to formulate an opinion that a mistake had been made, an allegedly negligent surgical operation); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223, 1244 (E.D.N.Y. 1985) ("[t]he more restrictive view requires the trial court to determine not only whether the data are of a type reasonably relied upon by experts in the field, but also whether the underlying data are untrustworthy for hearsay or other reasons"), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988); *United States v. Jones*, 605 F. Supp. 513-, 516-17 (S.D.N.Y. 1984) (same). *See generally* Eads, *Adjudication By Ambush: Federal Prosecutors' Use of Nonscientific Experts In a System of Limited Criminal Discovery*, 67 N.C.L. REV. 577, 597 (1989) ("[t]he systems's safeguards that are capable of preventing unreliable expert testimony -- the sixth amendment's reliability test and rule 703's requirement of reasonable reliance -- are not being used by the courts to protect the integrity of the fact-finding process").

Rule 703, in conjunction with the Confrontation Clause of the Sixth Amendment, bars unreliable expert testimony in either of two ways:

> In some cases examination of the basis of an expert's opinion reveals that it is supported by no reliable evidence at all. In such cases exclusion of the expert's opinion under Rule 703 ... might be appropriate. In other cases, an expert's opinion is supported by some credible evidence, but further investigation reveals that there is other, much more persuasive evidence available which undermines the expert's opinion and which the expert is ignoring. In these cases, the court might exclude the expert's testimony either under Rule 702, as not being helpful to the trier of fact, or under Rule 403, as being likely to mislead the jury.

Jack Weinstein, *Role of Expert Testimony and Novel Scientific Evidence in Proof of Causation* 30-31 (Aug. 9, 1987) (address before ABA Annual Meeting), quoted in Note, *"Helpful" Or "Reasonably Reliable"? Analyzing the Expert Witness's Methodology Under Federal Rules of Evidence 702 and 703*, 77 CORNELL L. REV. 350, 386 n. 231 (1992).

Williamson's critical opinions -- that a ship-to-ship transfer occurred and that it was "impossible" to smuggle drugs through the port in Callao, Peru -- were based on a combination of assumptions unsupported by any "evidence," credible or otherwise, and upon evidence undermined by other facts Williamson chose to ignore. Accordingly, his opinions should have been stricken as too unreliable to pass muster under Rules 702 and 703 and the Sixth Amendment.

C. The Eleventh Circuit's Construction of Rules 701-703 Impermissibly Allows Experts To Usurp the Jury's Duty To Independently Evaluate the Credibility of Other Trial Witnesses

The Eleventh Circuit also failed in its "gatekeeping" responsibilities, because Williamson's testimony was based, in part, upon *his* evaluation of the credibility of other trial witnesses and log entries. Since Williamson was not an expert on truthtelling, opinions based upon his personal assessment of the reliability of other evidence should have been excluded as "unhelpful" to the jury under Rule 702. The Eleventh Circuit's approval of such testimony herein also directly conflicts with opinions from at least four other circuits.

For example, in *United States v. Scop*, 846 F.2d 135 (2d Cir. 1988), *modified on other grounds*, 856 F.2d 5 (2d Cir. 1988), the defendants were charged with securities violations, mail fraud and related offenses. At trial, the government introduced the testimony of an expert whose opinions were based in part upon his assessment of the trustworthiness and accuracy of other trial witnesses. The Second Circuit found that it was improper for the expert to base his opinion on such factors, because the credibility of witnesses was a matter solely for the jury to decide. 846 F.2d at 142. Since the basis for the expert's opinion was flawed, the court ruled that the expert testimony should have been excluded. As the court explained:

> [W]e believe that such testimony not only should be excluded as overly prejudicial but also renders inadmissible any secondary opinion based upon it. Our holding, therefore, is that witness A may not offer an opinion as to relevant facts based on A's assessment of the trustworthiness or accuracy of witness B where B's credibility is an issue to be determined by the trier of fact. Were we to rule otherwise, triers of fact would be called upon either to evaluate opinion testimony in ignorance of an important foundation for that opinion or to hear testimony that is otherwise inadmissible and highly prejudicial.

Id. Accord United States v. Benson, 941 F.2d 598, 604 (7th Cir. 1991) (expert testimony by IRS agent reversible error, in part, because agent relied "in large part 'on the testimony of certain witnesses whose credibility was vigorously attacked'" by the defendant; finding that agent's opinions were, therefore, based on improper "credibility determinations")(citations omitted). *See also United States v. Azure*, 801 F.2d 336, 340-41 (8th Cir. 1986); *United States v. Price*, 722 F.2d 88 (5th Cir. 1983).

Like the experts in *Scop*, *Benson*, *Azure* and *Price*, Williamson was permitted to give his "stamp of approval" to witness testimony and documents in dispute. *Benson*, 941 F.2d at 603. Thus, in rendering his opinion about the ship-to-ship transfer he expressly credited the testimony of Officer Macedo and discredited the testimony of Officer Azbell concerning whether zinc was present underneath the container of cocaine. Similarly, Williamson told the jury that certain log entries were "reliable" and others "unreliable" in formulating his opinion

about the weather and sea conditions. In effect, Williamson told the jury who and what to believe.

However, "experts" on truthtelling do not exist. If they did, they would replace judges and juries. For this reason, absent stipulations to the contrary, courts have consistently barred the introduction of evidence concerning the results of truthtelling devices. *See generally United States v. Piccinonna*, 885 F.2d 1529, 1536 (11th Cir. 1989) (en banc); *Barrel of Fun, Inc. v. State Farm Fire & Casualty*, 739 F.2d 1028, 1031 (5th Cir. 1984) (collecting cases). For similar reasons, other circuits have barred testimony from psychologists and psychiatrists concerning the deceitful tendencies of witnesses[5] and the alleged unreliability of eyewitness testimony.[6]

---

[5] *See, e.g., United States v. Jackson*, 576 F.2d 46, 49 (5th Cir. 1978); *United States v. Wertis*, 505 F.2d 683, 685 (5th Cir. 1974), *cert. denied*, 422 U.S. 1045 (1975); *Bastow v. General Motors Corp.*, 844 F.2d 506, 510-11 (8th Cir. 1988); *United States v. Barnard*, 490 F.2d 907, 912-13 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974); *People v. Johnson*, 19 Cal. App. 4th 778, 12 Cal. Rptr. 2d 703 (1993).

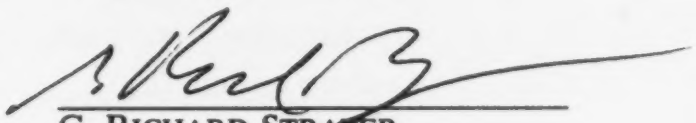
[6] *See, e.g., United States v. Holloway*, 971 F.2d 675, 679 (11th Cir. 1992); *United States v. Benitez*, 741 F.2d 1312, 1315 (11th Cir. 1984), *cert. denied*, 471 U.S. 1137 (1985); *United States v. Thevis*, 665 F.2d 616, 641 (5th Cir. Unit B), *cert. denied*, 456 U.S. 1008 (1982); *United States v. Foster*, 590 F.2d 381, 383 (1st Cir. 1989); *United States v. Watson*, 587 F.2d 365 (7th Cir. 1978); *United States v. Brown*, 540 F.2d 1048, 1054 (10th Cir. 1976); *United States v. Amaral*, 488 F.2d 1148, 1152-53 (9th Cir. 1983).

The Eleventh Circuit's decision in *Rojas* conflicts with this established body of precedent and opens the door to testimony which usurps the jury's function.

CONCLUSION

For all of the foregoing reasons, the Petitioner respectfully requests that his Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,



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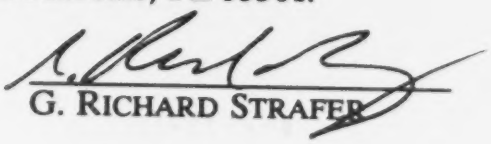
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was mailed this 6th day of October 1995 to: The Solicitor General, United States Department of Justice, 10th & Constitution Avenues, N.W., Washington, D.C. 20530; United States Department of Justice, Criminal Division, Appellate Section, P.O. Box 899, Ben Franklin Station, Washington, D.C. 20044-0899; and Phillip DiRosa, Assistant United States Attorney, United States Attorney's Office, 299 East Broward Blvd., Ft. Lauderdale, FL 33301.



G. RICHARD STRAFER

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Yerco Huerta ROJAS, Edwardo Gomez Verdugo, Manuel Flores-Flores, Fernando Gonzalez Lopez, Manuel Perez Vera, Amillio Heriquez, Carlos Zulaga, Edwardo Marco Diaz, Juan Antonio Orlandi-Steiger, Guillermo Guerrero, Osvaldo Sotgiu, Louis Lorenzo Berrios, John Castillo Tramon, Claudio Perez, Luis Arangena, Hector Herman Vidal-Arancibia, Gillermo Quesada, Defendants-Appellants.

No. 92-5039.

United States Court of Appeals,
Eleventh Circuit.

June 7, 1995.

Crew members of foreign vessel were convicted in the United States District Court for the Southern District of Florida, No. 92-0044-CR, Shelby Highsmith, J., 891 F.Supp. 644, of conspiracy to possess with intent to distribute, and possession with intent to distribute, cocaine aboard vessel, and of attempt to import cocaine. Defendants appealed. The Court of Appeals, Anderson, Circuit Judge, held that: (1) certification provision under Maritime Drug Law Enforcement Act did not violate separation of powers; (2) certificate did not create mandatory rebuttable presumption; and (3) introduction of certificate was not violation of Confrontation Clause.

Affirmed.

1. **Constitutional Law 80(1)**

Criminal Law 84(1)

Drugs and Narcotics 43.1

Provision of maritime Drug Law Enforcement Act, whereby jurisdiction over foreign vessel and crew may be proved by certification of Secretary of State that nation under which vessel was registered consented to jurisdiction, did not violate separation of powers by unconstitutionally delegating to Executive Branch assertedly essential function of judiciary in determining jurisdiction; certification provision did not deprive court of ability or obligation to determine if requirements for jurisdiction under Act were met. U.S.C.A. Const. Art. 3, § 1 et seq.; Maritime Drug Law Enforcement Act, § 3(c)(1)(C), 46 App. U.S.C.A. § 1903(c)(1)(C).

2. **Constitutional Law 67**

Negotiation with foreign country for permission to impose United States law in that nation's territory was not an inherently judicial function, for separation of powers purposes. U.S.C.A. Const. Art. 2, § 2, cl. 2; Art. 3, § 1 et seq.

3. **Constitutional Law 266(7)**

Mandatory rebuttable presumption violates Due Process Clause if it relieves government of burden of persuasion on element of offense. U.S.C.A. Const.Amend. 5.

4. **Constitutional Law 266(7)**

Criminal Law 99

No mandatory presumption in violation of due process was created by certification of Secretary of State that foreign nation consented to United States jurisdiction over foreign vessel under Maritime Drug Law Enforcement Act; jury was not instructed that it had to find, or that it should have found, jurisdiction follows from introduction of certificate. U.S.C.A. Const.Amend. 5; Maritime Drug Law Enforcement Act, § 3(c)(1)(C), 46 App.U.S.C.A. § 1903(c)(1)(C).

5. **Criminal Law 419(12), 429(1), 662.40**

To extent that certification of Secretary of State evidenced that foreign nation under which vessel was registered consented to United States' exercise of jurisdiction over vessel and crew pursuant to Maritime Drug Law Enforcement Act was verbal act, it was not hearsay and therefore its introduction was not violation of Confrontation Clause; remainder of certification was admissible as public document. U.S.C.A. Const.Amend. 6; Maritime Drug Law Enforcement Act, § 3(c)(1)(C), 46 App. U.S.C.A. § 1903(c)(1)(C); Fed. Rules Evid.Rule 803(8)(A), 28 U.S.C.A.

G. Richard Strafer, Quinon & Strafer, P.A., Miami, FL, or Rojas.

Harry M. Solomon, Miami, FL, for Verdugo, Sotgiu, Tramon.

Benjamin S. Waxman, Robbins, Tunkey, Ross, Amsel & Raben, Miami, FL, for Flores, Lopez, Arangena, Arancibia.

Nathan P. Diamond, P.A., Miami, FL for Vera, Diaz, Guerrero, Quesada.

Michael J. Rosen, Rosen Law Offices, P.A., Miami, FL, for Henriquez, Berrios, Perez, Orlandi-Steiger.

Roy J. Kahn, Miami, FL, for Zulaga.

Kendall B. Coffey, U.S. Atty., Phillip DiRosa, Dawn Bowen, Linda Collins Hertz, Asst. U.S. Attns., Miami, FL, for appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before ANDERSON and BIRCH, Circuit Judges, and JOHNSON, Senior Circuit Judge.

ANDERSON, Circuit Judge:

On January 6, 1992, the United States Coast Guard seized the Panamanian vessel M/V Harbour (the "Harbour") in international waters. Upon boarding the ship, the Coast Guard discovered cocaine concealed underneath zinc concentrate in one of the cargo holds. Appellants, 17 of the Harbour's crew, were convicted of conspiracy to possess with intent to distribute, and possession with intent to distribute, cocaine aboard a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. App. §§ 1903(j) and (g) (Counts I and II); and attempt to import cocaine into the United States, in violation of 46 U.S.C. §§ 963, 960, and 952(a) (Count III). On this direct

appeal, appellants argue that the Maritime Drug Enforcement Act (the "MDEA"), U.S.C. §§ 1901, *et seq.*, in particular 46 U.S.C. App. § 1903(c)(1)(C), is unconstitutional as a violation of the principal of separation of powers, due process, and the confrontation clause.[1] We affirm.

---

[1] Appellants also argue that: (1) the certificate of Panama's consent to United States jurisdiction did not satisfy the requirements of 42 U.S.C. App. § 1903(c)(1)(C); (2) the district court erred in denying a motion to suppress evidence seized in a warrantless search of crew members' cabins; (3) the district court erred in denying a motion to suppress evidence derived from the seizure of appellants' clothing while appellants were in post-arrest custody; (4) the district court erred in admitting the "prior bad acts" of Barria and Aravena under Fed.R.Evid. 404(b); (5) the district court erred in allowing the expert testimony of witnesses Lori Reiser, Daniel Lopez, Edward Kacerosky, and Brian Williamson under Fed.R.Evid. 702; (6) the evidence was insufficient to support appellants' convictions; (7) the district court erred in denying a motion to voir dire the jury to determine whether there had been premature discussion of the case; (8) the prosecutor's prejudicial remarks in opening statement and closing argument warrant a new trial; (9) the sentencing guidelines violate the Administrative Procedure Act; (10) the district court should have departed downward on Rojas' sentence because the extremely large quantity of drugs involved skewed his sentence, and because of the collateral consequences of his status as a deportable alien; and (11) the district erred in concluding it could not depart downward on Vera's sentence under U.S.S.G. § 5H1.1 due to his age and health alone, with demonstration of any "extraordinary" infirmity. These arguments are without merit.

I. THE MARITIME DRUG ENFORCEMENT ACT

Under the Maritime Drug Law Enforcement Act, 46 U.S.C. App. §§ 1901, *et seq.*, "[i]t is unlawful for any person ...on board a vessel subject to the jurisdiction of the United States ... to knowingly or intentionally ... possess with intent to manufacture or distribute, a controlled substance." 46 U.S.C. App. § 1903(a). The Act also criminalizes conspiracy to violate subsection (a). 46 U.S.C.App. § 1903(j). Vessels "subject to the jurisdiction of the United States" include vessels "registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of the United States law by the United States." 46 U.S.C.App. § 1903(c)(1)(C). Such consent "may be obtained by radio, telephone, or similar oral or electronic means, and may be provided by certification of the Secretary of State of the Secretary's designee." 46 U.S.C.App. § 1903(c)(1). In this case, the Panamanian government's consent to search the Harbour, a Panamanian vessel, was evidenced by certificate pursuant to § 1903(c)(1)(C). Appellants argue that this certification procedure is unconstitutional.

II. SEPARATION OF POWERS

Appellants assert that the MDEA's certification procedure unconstitutionally delegates the ability to determine jurisdiction, "a traditional, if not vital, function of the Judiciary," to the Executive branch. "The Constitution's division of power among the three Branches is violated where one Branch invades the territory of another..." *New York v. United States,* 505 U.S. 144, ___, 112 S.Ct. 2408, 2431, 120 L.Ed.2d 120 (1992). Thus, the Legislative and Executive Branches may not encroach on what is an "inherently" judicial power. Because the courts have had few opportunities to address attempts by the other

Branches to interfere with the core functions of the Judiciary, *see In re Stone,* 986 F.2d 898, 901 (5th Cir. 1993) (noting that there have been fortunately few legislative attempts to interfere with core judicial powers), the exact scope of this "inherent judicial power" is uncertain. At its core, the Judiciary's constitutional function is the impartial, independent, and final adjudication of disputes with the jurisdiction of the courts. U.S. Const. art. III; *see also Plaut v. Spendthrift Farm, Inc.,* ___ U.S. ___, ___, 115 S.Ct. 1447, 1452, 131 L.Ed.2d 328 (U.S. 1995) (The Constitution "gives the Federal Judiciary the power, not merely to rule on cases but to *decide* them." (emphasis in original)); *Northern Pipeline Const. Co. v. Marathon Pipe Line* Co., 458 U.S. 50, 58-60, 102 S.Ct. 2858, 2865, 73 L.Ed.2d 598 (1982) (The purpose of life tenure and irreducible compensation under Article III is "to ensure the independence of the Judiciary from the control of the Executive and Legislative Branches of government."); *Application of President's Comm'n on Organized Crime,* 763 F.2d 1191, 1197 (11th Cir. 1985) ("Impartiality is one of the central, constitutionally-ordained requirements of federal judicial office...."). Thus, separation of powers would be implicated when the actions of another Branch threaten an Article III court's independence and impartiality in the execution of its decision making function. *See, e.g., Plaut,* ___ U.S. at ___, 115 S.Ct. at 1455-56 (Congress cannot retroactively command federal courts to reopen final judgments); *Northern Pipeline,* 458 U.S. at 70, 102 S.Ct. at 2871 (Congress cannot remove adjudication of an entire class of "private rights" from the Judiciary and give such adjudication to non-Article III courts); *United States v. Klein,* 80 U.S. (13 Wall.) 128, 146-147, 20 L.Ed. 519 (1871) (Congress may not interfere with a court's inherent power to decide cases by dictating a decision in a particular case); *Hayburn's Case,* 2 U.S. (2 Dall.) 408, 1 L.Ed. 436 (1792) (Final decisions of federal courts cannot be subject to review by Executive Branch).

[1] This is not a case in which the other branches have interfered with the independence or impartiality of an Article III court, or with its decision making role in a case which is under its jurisdiction. The challenged certification provision merely provides a method by which the Executive Branch may evidence that it has obtained a foreign nation's consent to jurisdiction. *See United States v. Mena* 863 F.2d 1522, 1523 (11th Cir.) (In enacting the MDEA's certification procedure, "Congress sought merely to provide United States attorneys with an alternate method of proof that could alleviate difficulties in obtaining and translating foreign-government documents."), *cert. denied,* 493 U.S. 834, 109 S.Ct. 109, 110, 107 L.Ed.2d 72 (1989). Nothing in the certification procedure deprives the court of its ability and obligation to determine whether the requirements of the MDEA have been met. The Act does not dictate the court's jurisdictional decision. Under the MDEA, courts are free to determine, and do decide, whether a proffered certificate is sufficient evidence of jurisdiction. *See, e.g., Mena,* 863 F.2d at 1531-33 (holding that proffered certificate was admissible and sufficient to meet consent requirement); *United States v. Robinson-Munoz,* 961 F.2d 300, 305 (1st Cir.1992) (holding that certificate contained sufficient information to establish jurisdiction beyond a reasonable doubt).[2]

Moreover, contrary to appellants assertion, the power to determine the jurisdiction of the courts of the United States is

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[2] We express no opinion as to whether a vessel is "subject to the jurisdiction of the United States" under the MDEA is a question of law for the court to decide, or a question of fact reserved to the jury. *See Mena,* 863 F.2d at 1532 (discussing conflict over whether jurisdiction is question of law or fact). Whether the question is resolved by the jury or the judge is not relevant to our separation of powers analysis in this case.

not purely judicial. Although Article III defines the outer limits of jurisdiction, the Judicial Branch relies on the Legislative Branch to define the exact parameters of such power. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174, 2 L.Ed. 60 (1803). The courts also rely on the Executive, in conjunction with the Senate, to define the scope of Jurisdictional authority through treaty. U.S. Const. art. II, § 2 ("The President...shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties"); 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under ... treaties of the United States."). Therefore, the scope of the jurisdiction of our courts is a domain which all branches of our government must share to some extent.

[2] We need not decide whether there may be aspects to a jurisdiction question that are uniquely adjudicative, and thus properly reserved to the Judicial Branch. However, negotiation with a foreign nation for permission to impose United States law in that nation's territory is certainly not an inherently judicial function. We readily conclude that the certification procedure does not implicate separation of powers.

III. DUE PROCESS

[3] Appellants also argue that the certification procedure violates due process because it creates a mandatory rebuttable presumption that the government, upon introduction of the certificate, has satisfied the jurisdiction element of the offence. "[A] mandatory rebuttable presumption *requires* a jury to find that the presumed fact follows from the proven fact *unless* the defendant produces evidence to rebut the existence of the presumed fact." *Miller v. Norvell*, 775 F.2d 1572, 1575 (11th Cir. 1985) (emphasis in original), *cert. denied*, 476 U.S. 1126, 106 S.Ct. 1995, 90 L.Ed.2d 675 (1986). Such presumption violates the Due Process Clause if it relieves the government of the

burden of persuasion on an element of the offence. *Francis v. Franklin*, 471 U.S. 307, 314, 105 S.Ct 1965, 1971, 85 L.Ed.2d 344 (1985).

[4] Appellant's argument is misplaced. In this case, the court instructed the jury that it must find all of the elements of the offense beyond a reasonable doubt, including the element that the appellants were aboard a vessel subject to the jurisdiction of the United States.[3] The jury was not instructed that it must find, or even that it should find, that jurisdiction follows from the introduction of the certificate. There was no instruction whatsoever regarding how much weight the jury should give the certificate. Simply stated, no mandatory

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[3] The court instructed the jury as follows:

> ...Count 2 charges the defendants with a violation of Title 46, Section 1903(a) and 1903(g). These sections make it a federal crime for anyone on board a vessel subject to the jurisdiction of the United States to knowingly possess any controlled substance with intent to distribute it.
>
> ...The defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt. First, that the defendant was on board a vessel subject to the jurisdiction of the United States.
>
> ...The term "vessel subject to the jurisdiction of the United States" means a vessel registered in a foreign nation where the flagged nation has consented or waived objection to the enforcement of the United States law by the United States.

presumption was created. Moreover, the instruction placed the burden of proving the jurisdictional element of the offense on the prosecution.

IV. CONFRONTATION CLAUSE

[5] Appellants' final argument is that the certificate contains inadmissible hearsay and, thus, its introduction at trial violated the Confrontation Clause. To the extent that the document evidences the Panamanian government's consent, it is a verbal act and, therefore, not hearsay. *Mena*, 863 F.2d at 1531. The remainder of the document is a public document, admissible under Fed.R.Evid. (803)(8)(A). *Id.* Such certification by a government official falls within a well-established exception to the hearsay rule, and is not a violation of the Confrontation Clause. *United States v. Aikins*, 946 F.2d 608, 614 (9th Cir. 1990).

V. CONCLUSION[4]

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

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[4] Appellant Aravena's motion to withdraw his appeal because of his alleged dissatisfaction with counsel is DENIED. His motion to appoint new counsel and proceed *in forma pauperis* is DENIED. His asserted reasons are frivolous.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-5039.

UNITED STATES of America,

Plaintiff-Appellee,

versus

Yerco Huerta ROJAS, Edwardo Gomez Verdugo, Manuel Flores-Flores, Fernando Gonzalez Lopez, Manuel Perez Vera, Amillio Heriquez, Carlos Zulaga, Edwardo Marco Diaz, Juan Antonio Orlandi-Steiger, Guillermo Guerrero, Osvaldo Sotgiu, Louis Lorenzo Berrios, John Castillo Tramon, Claudio Perez, Luis Arangena, Hector Herman Vidal-Arancibia, Gillermo Quesada,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion_____, 11th Cir., 19__, ___F.2d____).

Before: ANDERSON and BIRCH, Circuit Judges, and JOHNSON, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)